

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 SUE SHERMAN,

4
5 Petitioner,

Case No. 07-2-0021

6 v.

ORDER DISMISSING THE CASE

7
8 SKAGIT COUNTY,

9 Respondent.
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12 THIS Matter comes before the Board on Skagit County's Dispositive Motion to Dismiss for
13 Failure to Comply with the Requirement to Serve the Skagit County Auditor (County's
14 Motion to Dismiss) filed with the Board on December 4, 2007. Petitioner Sue Sherman filed
15 an answer to the motion on December 5, 2007.¹
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17 **I. SUMMARY OF THE DECISION**

18 The Board dismisses the Petition for Review in this case based on Petitioner's failure to
19 timely serve the Skagit County Auditor and substantially comply with WAC 242-02-230(1).
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21 **II. PROCEDURAL HISTORY**

22 Petitioner filed a petition for review (PFR) with the Board on November 8, 2007. The
23 petition challenges the County's designation of her property as Industrial Forest Land. On
24 December 4, 2007 the County filed its motion to dismiss the case and Petitioner answered
25 the County's Motion on December 5, 2007. The Board issued a Preliminary Notice and
26 Schedule on November 14, 2007. A telephonic prehearing conference was held on
27 December 5, 2007. At the prehearing conference, Petitioner requested that a hearing on
28 the County's motion be held.
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¹ Petitioner Answers Respondent's Motion to Dismiss for Failure to Comply with the Requirements to Serve the Skagit County Auditor and Proof of Service of Petition for Review (Petitioner's Answer).

1 A motions hearing was held telephonically on December 10, 2007 to hear arguments on the
2 County's motion to dismiss. Deputy Prosecutor Arne Denny represented Skagit County.
3 Petitioner Sue Sherman represented herself. All three board members attended
4 telephonically; Board Member Holly Gadbow presided.
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6 **III. ISSUE PRESENTED**

7 Should the petition for review be dismissed for failure to timely serve the Skagit County
8 Auditor with a copy of the petition for review pursuant to WAC 242-02-230?
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10 **IV. DISCUSSION OF THE ISSUE**

11 Positions of the Parties

12 **County's Position**

13 Skagit County asserts that the Petitioner failed to properly serve the County. According to
14 the County, the Petitioner faxed a copy of her petition for review to the County
15 Commissioners on November 8, 2007 but the Auditor was not served. The County argues
16 that although WAC 242-02-230 allows a petition for review (PFR) to be filed by telefacsimile,
17 it does not permit such service on a county. Further, the County maintains that for
18 noncharter counties such as Skagit, the rules require a petitioner to serve a copy of the
19 PFR on the County Auditor, either personally or by mail. The County alleges that Petitioner
20 failed to meet either of these requirements.²
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23 The County urges the Board to adopt the Central Puget Sound (Central Board) and the
24 Eastern Washington Growth Management Hearings Board's (Eastern Board) position on
25 this subject. Both of these growth management hearings boards hold that a failure to serve
26 the County Auditor, when serving a PFR on a County respondent, deprives the Board of
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² County's Motion to Dismiss at 2.
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1 jurisdiction to hear the petition.³ In support of this argument, the County cites cases from
2 both of these boards⁴.

3
4 The County notes that the Western Washington Growth Management Hearings Board's
5 (Western Board's) previous holdings⁵ on service upon a county has differed from that of the
6 Central and Eastern Boards. In these cases, the Western Board ruled that RCW
7 36.70A.280 and .290, the sections of the Growth Management Act that set out the Boards'
8 jurisdiction, include no requirements for service other than for service on the appropriate
9 Board. Therefore the Western Board concluded the County or the City did not suffer
10 substantial prejudice by the failure to serve the City or County. The County points out that
11 these cases were decided in 1995 and 1997, before the boards changed their rules on
12 service of petitions upon cities and counties in 2004; now the rules require that the local
13 government officials specified in the rule must be served with the petition personally, or the
14 petition must be mailed, on the same day that the Board was served.⁶

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17 Further, even if substantial compliance with the rules were the standard, the County
18 contends that there is no evidence that Petitioner made any effort to serve the County
19 Auditor. Additionally, the County asserts that Petitioner's decision to fax a copy of her
20 petition to the county commissioner's office does not meet the requirement for personal
21 service or service by mail. For these reasons, the County urges that Petitioner's failure to
22 meet WAC 242-02-230's requirements for service should not be excused.⁷

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28 ³ Ibid at 2 and 3.

29 ⁴ *City of Tacoma v. Pierce County*, CPSGMHB Case No. 06-3-0011c (Order on Motion to Dismiss and Order
30 on Intervention, May 1, 2006); *Abercrombie v. Chelan County*, EWGMHB Case No. 00-1-0008 (Order on
31 Dispositive Motions, June 16, 2000).

32 ⁵ *Taxpayers for Responsible Government v. City of Oak Harbor*, WWGMHB Case No. 97-2-0061 (Order
Denying Dismissal, December , 1997) (*Taxpayers and Michael and Catherine Achen v. Clark County (Achen)*,
WWGMHB Case No. 95-2-0067 (Final Decision and Order, September 20, 1995)

⁶ County's Motion to Dismiss at 4 and 5.

⁷ Ibid at 6.

1 **Petitioner's Position**

2 Petitioner does not claim that she made any attempt to serve the County Auditor. Instead,
3 she says she did not serve the Auditor's Office because the petition for review challenges
4 the action of the County Commissioners, not the action of the Auditor. She asserts that
5 "according to the auditor office they have nothing to do with the GMA or the
6 Commissioners."⁸ She argues that the Respondent's attorney wants the Board to adopt a
7 rule in this case that would benefit the County, even though the Board is not required to do
8 this.⁹ She says she is sending a certificate of service dated November 8, 2007 and says
9 she certifies that she sent a petition by first class mail to the County Commissioners office
10 on that date.¹⁰
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13 Board Discussion

14 Pursuant to the statutory authority in RCW 36.70A.270(7), the joint growth management
15 hearings boards have adopted rules of practice and procedure. These rules are published
16 in the Washington Administrative Code, Ch. 242-02 WAC. Except where there is a specific
17 conflict in the GMA or the Administrative Procedures Act, the boards' rules of practice and
18 procedure " shall govern the practice and procedure of the boards."¹¹
19

20
21 The procedures to be followed in serving a petition for review upon local government are set
22 out in WAC 242-02-230:

- 23 (1) The original and four copies of the petition for review shall be filed with a board
24 personally, or by first class, certified, or registered mail. Filings may be also made
25 with the board by telefacsimile transmission as provide in WAC 242-02 240. A
26 copy of the petition for review shall be personally served upon all other named
27 parties or deposited in the mail and postmarked on or before the date filed with
28 the board. *When the county is a party, the county auditor shall be served in*
29 *noncharter counties and the agent designated by the legislative authority in*
30 *charter counties.* The mayor, city manager or city clerk shall be served when the
31 city is a party. When the state of Washington is a party, the office of the attorney

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⁸ Petitioners' Answer at 1.

⁹ Ibid at 1.

¹⁰ Ibid at 2.

¹¹ RCW 36.70A.270(7)

1 general shall be served at its main office in Olympia, unless service upon the
2 state is otherwise provided by law. Proof of service may be filed with the Board
3 pursuant to WAC 242-02-340.

(emphasis added)

4 However, the rule also sets a standard for compliance. Under WAC 242-02-230(2),
5 “substantial compliance” rather than “strict compliance” is required. That section provides:

6 (2) A board may dismiss a case for failure to substantially comply with subsection (1)
7 of this section.”
8

9 Petitioner concedes that she did not serve the Skagit County Auditor and instead served the
10 Skagit County Commissioners.¹² The fax cover sheet attached to her petition confirms this,
11 as well as the declaration of Cheri Cook-Blodgett, an employee in the Skagit County
12 Commissioners’ office. Petitioner states that because the County Commissioners took the
13 action affecting her property, it made sense to her to serve the County Commissioners.¹³
14

15 Petitioner asserts that she called the Skagit County Auditor’s office to discuss her property
16 and in the course of that discussion an Auditor’s office employee told her that office had
17 nothing to do with the GMA.¹⁴ In response to Board questions, Petitioner stated that she did
18 not attempt to serve the County Auditor nor did she consult the boards’ rules before serving
19 the County.
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22 The joint growth management hearings boards amended WAC 242-02-230 in 2004 and
23 2006 as follows:

24 (1)The original and ~~three~~ four copies of the petition for review shall be filed with a
25 board personally, or by first class, certified, or registered mail. Filings may be also
26 made with the board by ~~telegraph or telefacsimile~~ transmission as provide in WAC
27 242-02 240. A copy of the petition for review shall be personally promptly upon all
28 other named parties or deposited in the mail and postmarked on or before the date
29 filed with the board. When the county is a party, the county auditor shall be served in
30 noncharter counties and the agent designated by the legislative authority in charter
31 counties. The mayor, city manager or city clerk shall be served when the city is a

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¹² Petitioner Answer at 1.

¹³ Ibid at 1 and 2.

¹⁴ Ibid at 2. It appears that the Petitioner called to discuss the tax status of her property and so was speaking
with the County Assessor’s Office.

1 party. When the state of Washington is a party, the office of the attorney general
2 shall be served at its main office in Olympia, unless service upon the state is
3 otherwise provided by law. Proof of service may be filed with the Board pursuant to
4 WAC 242-02-340

5 (2) A board may dismiss a case for failure to substantially comply with subsection (1)
6 of this section.¹⁵

7 This rule, as it appears above, except for the requirement to file four copies, became
8 effective on November 14, 2004.¹⁶ These rule changes were adopted quite a few years
9 after the Board's decisions in *Taxpayers* (1997) and *Achen* (1995). Since then the Western
10 Board has had the opportunity to review this rule and participated in its revision and the
11 revision's adoption. Therefore, this action shows that this Board affirms the rule as it is
12 currently stated. Further, as the County points out, the Board in *WEAN* showed that it
13 follows the express language of the WAC:
14

15 The Boards properly adopted the rules for practice and procedure pursuant to the
16 delegation in RCW 36.70A.270(7). Proper methods of filing are typically the province
17 of rules, rather than statutes. See CR 5(e). There are no contrary rules in the GMA
18 itself, so the Boards' rules govern.¹⁷
19

20 Although Petitioner herself has not claimed that she substantially complied with WAC 242-
21 02-230, the Respondent has addressed this issue in its briefing and the dissent would have
22 us find that Petitioner substantially complied with WAC 242-02-230. We believe that the
23 Central Board reached the correct conclusion when it ruled that before we can find
24 substantial compliance, the petitioner must show a good faith effort to make proper
25 service.¹⁸ The rationale of the doctrine of substantial compliance is that one who has made
26 a good faith effort to comply with a technical requirement, noncompliance with which leaves
27 him open to liability, should not be subject to that liability for a failure to literally comply.¹⁹
28 Where, as here, there has been no attempt to comply with the service requirements of WAC
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¹⁵ Amendments to WAC 242-02-230 are shown with underlines for additions and strike-throughs for deletions.
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Western Washington
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1 242-02-230 as it pertains to service upon the Auditor, we cannot find substantial
2 compliance.

3
4 The Board realizes that filing and managing a case before a Growth Management Hearings
5 Board can be daunting for a *pro se* petitioner. Nevertheless, the Board was directed by the
6 Legislature to establish rules for its proceedings.²⁰ These rules are published in 242-02
7 WAC. The rules are published so that petitioners and counties and cities alike know how
8 the Boards operate. The rules do not make exceptions for petitioners representing
9 themselves *pro se*. Filing a petition for review also imposes the obligation to be familiar with
10 the Boards' rules of procedure that are readily available from the Boards' office or on the
11 State of Washington's website, among others.
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14 **Conclusion:** WAC 242-02-230(1) requires that petitions for review be served on the auditor
15 in noncharter counties, such as Skagit County. WAC 242-02-230(2) allows the Board to
16 dismiss cases that do not comply with 242-02-230(1). Petitioner concedes she did not
17 serve the Skagit County auditor with her petition. No evidence in the record shows that any
18 County employee instructed her incorrectly on the rules of service. Petitioner has not
19 substantially complied with WAC 242-02-230. Therefore, the petition for review in this case
20 is dismissed.
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22 ORDER

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24 Based on the foregoing, the Board finds that Petitioner did not attempt to serve the petition
25 for review in this case according to the procedure specified in WAC 242-02-230(1), and has
26 not substantially complied with this provision. Pursuant to WAC 242-02-230(2), the Board
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30 ¹⁶ CR 103 (October 7, 2004). The requirement that four copies of the Petition for Review be filed with a board
become effective June 26, 2006.

31 ¹⁷ *WEAN v. Island County*, WWGMHB Case No. 06-2-0027 (Order Dismissing Petition For Review, November
32 16, 2006) at 5.

¹⁸ *Kent Cares, et al. v. City of Kent*, CPSGMHB Case No. 03-3-0012, Order on Motions (July 31, 2003).

¹⁹ *True's Oil Co. v. Keeney*, 76 Wn.2d 130, 139 (Wash. 1969)

²⁰ RCW 36.70A.270 (7).

1 GRANTS the County's motion to dismiss. The petition for review is therefore hereby
2 DISMISSED.

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4 Entered this 20th day of December 2007.

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Holly Gadbow, Board Member

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James McNamara, Board Member

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14 **DISSENT**

15 Because I believe that the standard for determining adequacy of service upon the County
16 under the GMA is "substantial compliance" and whether there was prejudice to the other
17 party, I respectfully dissent.

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19 The County acknowledges that it has received actual knowledge of the petition for review in
20 this case. Petitioner properly filed her petition for review with the Board within the timeframe
21 established by the statute – RCW 36.70A.290. However, the County requests the Board to
22 dismiss the petition because the Petitioner served the County Commissioners instead of the
23 County Auditor, and used facsimile transmission instead of personal service or mail.²¹ The
24 County's motion is based on the theory that strict compliance with the board rules regarding
25 service on the County Auditor is required.
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32 ²¹ Petitioner alleges she mailed her petition for review to the County Commissioners on the same day that she
faxed it. Petitioner Answers Respondents Motion to Dismiss for Failure to Comply with Service to Skagit
County Auditor, and Proof of Service of Petition for Review at 2.

1 “Substantial compliance” is characterized as “satisfaction of the spirit” of a procedural
2 requirement.²² Unless compliance with a procedural requirement is jurisdictional in nature,
3 substantial compliance promotes the “sound public policy” of allowing the merits of a
4 controversy to be reached.²³

5
6 Where there is a statutory requirement, especially statutory time limits, the principle of
7 substantial compliance does not apply but strict compliance is required.²⁴ However, where
8 not statutorily required, service on the parties is not jurisdictional and actual notice is
9 sufficient:
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11 The distinct preference of modern procedural rules is to allow appeals to proceed to a
12 hearing on the merits in the absence of serious prejudice to other parties. Therefore,
13 substantial compliance with procedural rules, other than those which constitute the
14 most basic steps, is sufficient.²⁵

15 In the case of the requirement to serve the County Auditor in WAC 242-02-230, this
16 requirement is not based in any provision of the GMA. RCW 4.28.080 requires a plaintiff to
17 serve the County Auditor to initiate suit against a county.²⁶ However, an action under the
18 GMA and the APA is not a “suit” but an administrative proceeding. The Administrative
19 Procedures Act (APA) allows an agency to commence an adjudicative proceeding “upon the
20 timely application of any person”.²⁷ It does not require service of the application upon
21 another party but instead provides:
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26 ²² *Black v. Department of Labor and Ind.*, 131 Wn.2d 547 at 552(1997).

27 ²³ *Crosby v. Spokane County*, 137 Wn.2d 296 at 301.(1999)

28 ²⁴ *City of Seattle v. Public Employment Relations Comm’n*, 116 Wn.2d 923, 809 P.2d 1379 (1991) cited with
29 approval in *Black v. Department of Labor and Industries*, 131 Wn.2d at 552 (1997)

30 ²⁵ *Hoirup v. Empire Airways, Inc.*, 679 Wn. App. 69 Wn App. 479, 483, 848 P. 2d 1337 (Division I - 1993).
31 Although the specific holding in the *Hoirup* case with respect to filing requirements to appeal an arbitrator’s
32 award was over-ruled in *Nevers v. Fireside*, 133 Wn.2d 804, 947 P.2d 721 (1997), the Court held in *Nevers*
that the statutory requirements were jurisdictional and thus subject to strict compliance. The Court continued
to cite *Hoirup* with approval in *Black v. Department of Labor and Industries*, 131 Wn.2d at 552 (1997) with
respect to substantial compliance.

²⁶ In a civil suit, service upon the County Auditor is required for non-charter counties. *Nitardy v. Snohomish
County*, 105 Wn.2d 133, 712 P.2d 296(1986).

²⁷ RCW 34.05.413(2)

1 An adjudicative proceeding commences when the agency or a presiding officer
2 notifies a party that a prehearing conference, hearing, or other stage of an
3 adjudicative proceeding will be conducted.

4 RCW 34.05.413(3)

5 The GMA tracks the APA in that all requests for review "shall be initiated by filing a petition
6 that includes a detailed statement of issues presented for resolution by the board."²⁸ There
7 is no requirement in the GMA for service upon the local government. Instead, the GMA
8 specifies that the board acts upon the petition for review by setting a time for hearing:

9 Unless the board dismisses the petition as frivolous or finds that the person filing the
10 petition lacks standing, or the parties have filed an agreement to have the case heard
11 in superior court as provided in RCW 36.70A.295, the board shall, within ten days of
12 receipt of the petition, set a time for hearing the matter.

13 RCW 36.70A.290(3)

14 Since service upon the opposing party is not a requirement for initiation of a petition for
15 review either under the APA or under the GMA, I would not find the obligation to serve the
16 County Auditor to be jurisdictional.

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18 The boards clearly have authority pursuant to RCW 36.70A.270(7) to set procedures to
19 govern the practice and procedure of the boards. The boards' rules cannot, however,
20 elevate a procedural service directive to a jurisdictional requirement. Moreover, the
21 dismissal of an action is a draconian remedy and the boards' own rules provide that
22 dismissal is only appropriate if "substantial compliance" is not found.²⁹

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25 In construing the requirement to serve the director of the Department of Labor and
26 Industries for an appeal under RCW 51.52.110, the Washington Supreme Court found that
27 substantial compliance requires that the director receive actual notice of the appeal or the
28 notice of appeal was served in a manner reasonably calculated to give notice to the
29 Director." Service upon the assistant attorney general is reasonably calculated to give
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28 RCW 36.70A.290(1)

29 WAC 242-02-230(2)

1 notice to the director, the Court concluded, so service upon the attorney substantially
2 complied with the service requirements of the statute.³⁰

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4 The situation here is analogous. In this case, a *pro se* petitioner misunderstood the remarks
5 of a county employee and served her petition for review on the County Commissioners.
6 She failed to read the board rules and served the Commissioners with her petition by
7 facsimile; however, she also alleges that she mailed a copy to the County Commissioners
8 the same day.³¹ The County received the petition for review and has actual knowledge of it.
9 Sending notice to the County Commissioners was reasonably calculated to give them actual
10 notice of the petition. There has been no prejudice to the County and I would find that the
11 Petitioner substantially complied with WAC 242-02-230.³²
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15 _____
16 Margery Hite, Board Member
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18 **Pursuant to RCW 36.70A.300 this is a final order of the Board.**

19 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the date
20 of mailing of this Order to file a petition for reconsideration. The original and three
21 copies of a motion for reconsideration, together with any argument in support
22 thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the
23 original and three copies of the motion for reconsideration directly to the Board, with
24 a copy to all other parties of record. **Filing means actual receipt of the document at**
25 **the Board office.** RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-330. The filing
26 of a motion for reconsideration is not a prerequisite for filing a petition for judicial
27 review.

28 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
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30 *Black v. Department of Labor and Ind.*, 131 Wn.2d 547, 553, 933 P.2d 1025 (1997)

31 Petitioner Answers Respondents Motion to Dismiss for Failure to Comply with Service to Skagit County Auditor, and Proof of Service of Petition for Review at 2.

32 The County urges that the Board rejected a substantial compliance argument in WEAN v. Island County, WWGMHB Case No. The County urges that the Board rejected a substantial compliance argument in WEAN v. Island County, WWGMHB Case No. 06-2-0027 (Order on Motion to Dismiss Petition, November 16, 2006). However, that case involved a failure to properly file the petition with the Board. Filing the petition for review with the Board is jurisdictional and not subject to substantial compliance.

1 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
2 judicial review may be instituted by filing a petition in superior court according to the
3 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
4 Enforcement. The petition for judicial review of this Order shall be filed with the
5 appropriate court and served on the Board, the Office of the Attorney General, and all
6 parties within thirty days after service of the final order, as provided in RCW
7 34.05.542. Service on the Board may be accomplished in person or by mail, but
8 service on the Board means actual receipt of the document at the Board office within
thirty days after service of the final order. A petition for judicial review may not be
served on the Board by fax or by electronic mail.

9 Service. This Order was served on you the day it was deposited in the United States
10 mail. RCW 34.05.010(19)

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